

tion 105(1) of the Bankruptcy Act (Cap. 18) which provides:

"105-(1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt... the court may annul the adjudication."

It is clear that under section 105(1) a bankruptcy may be annulled in the discretion of the court where the debtor ought not to have been adjudged bankrupt. It is for the debtor to satisfy the court that he ought not to have been adjudged bankrupt.

Mr. Cashin submits that on the facts before the learned Chief Justice the appellant had satisfied the court that he was not a "debtor" within the meaning of section 3(3) of the Bankruptcy Act.

Mr. Cashin submits that the appellant has satisfied the court that he was not domiciled in Singapore, that he has not, within a year before the date of the presentation of the petition, ordinarily resided in or had a dwelling-house or place of business in Singapore, or carried on business in Singapore personally or by an agent within Singapore. Now, these are questions, as Buckley L.J. said in *In re A Debtor*,⁽¹⁾ the investigation of which must involve consideration of the appellant's state of mind at the relevant time; they are matters which give rise to subjective questions on the appellant's state of mind.

The appellant, as he said, was involved in running the Mosbert Group of Companies and his interests are in Singapore. He had a dwelling-house here within one year before the date of the presentation of the petition.

The points raised by the appellant in his affidavits were raised before the learned Chief Justice and the learned Chief Justice was not prepared to accept the appellant's affidavits and the learned Chief Justice said that the best thing was for the appellant to appear in Singapore and be prepared to submit to cross-examination on the facts he deposed to in his affidavits and the learned Chief Justice was prepared to adjourn the hearing. The appellant's counsel, however, said that she would not be able to produce the appellant and that if the appellant did come to Singapore he would be arrested. Thereupon the learned Chief Justice dismissed the motion with costs.

As we have said the questions which have to be decided in this case are questions subjective to the appellant — questions of his frame of mind, his intention at various dates in relation to his residence, domicile and so forth. Those are matters in respect of which it seems to us that the physical presence of the appellant in Singapore to be cross-examined before the court is very highly desirable.

It seems to us that we should not interfere with the decision of the learned Chief Justice and it follows that this appeal must fail.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Donaldson & Burkinshaw.*

A MALAYSIA DAIRY INDUSTRIES PTE. LTD. & ANOR. v. YAKULT (SINGAPORE) PTE. LTD.

[O.C.J. (Chua J.) August 14, 1979]

[Singapore — Suit No. 1159 of 1979]

B *Industrial Designs — Registered Design — Cultured milk — Claim to exclusive shape of bottle — Injunction to restrain defendants from selling cultured milk drinks in bottles so got up as to be calculated to lead to defendants' product being confused with plaintiffs' product — No distinctive appearance of bottle — Claim dismissed.*

Trade Description — "The original LB-cultured milk drink" — Claim to exclusive right to letters "LB".

C *Practice and Procedure — Interlocutory injunction — Court must be satisfied claim not frivolous or vexatious before granting injunction.*

The first plaintiff (*MDI*) in this case commenced business in 1964 with the production of sweetened condensed milk. The second plaintiff (*MM*) was incorporated in Malaysia in 1969, and was a subsidiary of *MDI*. In 1977 *MM* commenced commercial production of a lactic acid drink with a milk base which was sold in 125 millilitre bottles. The bottle design was registered as U.K. Registered Design No. 977999 as of November 19, 1976. The bottle, made of plastic, bore the words "VITAGEN" and "CULTURED MILK DRINK" with a description of the flavours, on the upper outwardly protruding ring of the bottle and the word "VITAGEN" enclosed in a lozenge shape. A statement as to the contents and the name of the manufacturers (*MM*) and the name of the distributor in Singapore (*MDI*) were on the lower outwardly protruding ring of the bottle.

E Yakult Japan a leading manufacturer of a lactic acid drink known as "YAKULT" in Japan, registered the design of their bottle at the U.K. Design Registry as Registration Design No. 979895 as of May 4, 1977.

In May 1978 Yakult Japan instituted proceedings in London to remove the name of *MM* as proprietor of Registered Design No. 977999 and substituting therefore their name. These proceedings were contested by *MM*.

F The defendant company was a joint venture of Yakult Japan and Cerebos (Singapore) Pte. Ltd. The defendant company was incorporated in Singapore on August 1, 1978. On February 15, 1979 Yakult Singapore wrote to the plaintiffs indicating that they intended to sell their lactic acid drink in Singapore using the Yakult bottle. The plaintiffs then wrote on March 21, 1978, asking the defendants for an immediate written undertaking not to sell the lactic acid drinks in bottles which are identical to the Vitagen bottles. No such written undertaking was forthcoming. Instead, the defendants and Yakult Japan issued a writ on March 30, 1979 against the plaintiffs claiming "a declaration that unless and until the courts of the United Kingdom shall finally determine that the second defendant (*MM*) is the true and lawful proprietor and beneficial owner of the said Registered Design No. 977999 then each of the plaintiffs is entitled to manufacture and sell yogurt in Singapore in the Yakult Singapore containers".

H The plaintiffs sought to restrain the defendants from infringing U.K. Registered Design Number 977999. They applied for an injunction to restrain the defendants from selling or distributing cultured milk drinks in bottles so got up as to be calculated to lead the defendants' product being confused with the plaintiffs' product or from passing off cultured milk drinks not of the plaintiffs' manufacture as and for the plaintiffs' goods. The plaintiffs also claimed damages for the alleged infringement. They further claimed exclusive right to the letters "LB" on the container.

I **Held:** (1) in a case where a plaintiff seeks an interlocutory injunction, the court must be satisfied that the claim is not frivolous or vexatious;

(2) the plaintiffs had failed to establish that the shape of the Vitagen bottle had become by use in Singapore associated exclusively with the plaintiffs' lactic acid drink. Instead, it would appear, it was a copy of the Yakult container;

(3) the plaintiffs had also failed to prove that they have an exclusive right to use the letters "LB" on the container.

The said abbreviation is used in a purely descriptive sense.

(4) because of the difference in markings, size and get up and because of the proposed advertising campaign potential purchasers will not be misled.

Cases referred to:-

(1) *American Cyanamid v. Ethicon* [1975] 1 All E.R. 504.

(2) *Jarman & Platt Ltd. v. I. Barget Ltd.* [1977] F.S.R. 260.

MOTION IN SUIT.

Nicholas Phillips Q.C. (Michael Hwang with him) for the plaintiffs.

Vivian Price Q.C. (Tan Bok Hoay with him) for the defendants.

Cur. Adv. Vult.

Chua J.: The plaintiffs issued a Writ of Summons on April 19, 1979, against the defendants claiming

- (1) An injunction to restrain the defendants whether by themselves, their servants or agents or otherwise howsoever from infringing United Kingdom Registered Design Number 977999.
- (2) An injunction to restrain the defendants whether by themselves their servants or agents or otherwise howsoever from selling, offering for sale or otherwise distributing cultured milk drinks not of the plaintiffs' manufacture or merchandise in bottles so got up as to be calculated to lead to the defendants' product being confused with the plaintiffs' product or from in any other manner passing off or enabling others to pass off cultured milk drinks not of the plaintiffs' manufacture or merchandise as and for the plaintiffs' goods.
- (3) An enquiry as to damages by reason of infringement of the said UK registered design and/or passing off, or an account of profits, and payment of any sum found due.
- (4) Delivery up or destruction upon oath of all bottles the use whereof would offend against either of the foregoing injunctions.

On May 21, 1979, the plaintiffs filed a motion seeking an order

"that the defendants whether by themselves their servants or agents or otherwise howsoever be restrained until trial or further order from selling, offering for sale or otherwise distributing cultured milk drinks not of the plaintiffs' manufacture or merchandise in bottles so got up as to be calculated to lead to the defendants' product being confused with the plaintiffs' product or from in any other manner passing off or enabling others to pass off cultured milk drinks not of the plaintiffs' manufacture or merchandise as and for the plaintiffs' goods or for such further or other order as to this Honourable Court may seem fit and that the costs of this application be costs in the cause."

The motion was heard on July 24, 25 and 26, 1979, and at the end of the hearing I dismissed the motion and costs was reserved and I said I would give my reasons in writing at a later date. I now proceed to do so.

The short facts are these. The first plaintiff (*MDI*), a Singapore Company, commenced business in October 1964, with the production of sweetened condensed milk and subsequently additional products were manufactured by *MDI*. The second plaintiff (*MM*)

was incorporated in Malaysia in 1969 and is a wholly owned subsidiary of *MDI*. In 1975 arrangements were finalised with LB Co. Ltd. of Japan which supplied *MM* with the complete know-how relating to the manufacturing process of a lactic acid drink with a milk base. It was decided that the drink should be sold in 125 millilitre bottles and the bottle design was registered at the United Kingdom Design Registry as Registered Design No. 977999 as of November 19, 1976. *MM* commenced commercial production of their lactic acid drink at the end of April 1977. The drink has at all material times been sold in Singapore and Malaysia in plastic bottles made in accordance with Registered Design No. 977999 (hereinafter referred to as "the Vitagen bottle") bearing the words "VITAGEN" and "CULTURED MILK DRINK" with a description of the flavours, on the upper outwardly protruding ring of the bottle and the word "VITAGEN" enclosed in a lozenge shape and a statement as to the contents and the name of the manufacturers (*MM*) and the name of the distributor in Singapore (*MDI*) on the lower outwardly protruding ring of the bottle.

Kabushiki Kaisha Yakult Honsha of Tokyo, Japan, (hereinafter referred to as "Yakult Japan") a leading manufacturer of a lactic acid drink known as "YAKULT" in Japan, registered the design of their bottle at the United Kingdom Design Registry as Registration Design No. 979895 as of May 4, 1977, (hereinafter referred to as the "Yakult bottle").

In May 1978, Yakult Japan instituted proceedings in the High Court in London (No. 1978 M No. 2012) in which they sought an order that the United Kingdom Register of Designs should be rectified by removing therefrom the name of *MM* as proprietor of Registered Design No. 977999 and substituting therefor their name. These proceedings are being contested by *MM*.

On August 1, 1978, the defendant Company was incorporated in Singapore (hereinafter referred to as "Yakult Singapore"). Yakult Singapore is a joint venture between Yakult Japan, and Cerebos (Singapore) Pte. Ltd. Yakult Singapore intend to manufacture and sell in Singapore lactic acid drinks known as "YAKULT" in plastic bottles which are substantially similar in shape to the Vitagen bottle but slightly smaller.

On February 15, 1979, Yakult Singapore wrote to the two plaintiffs indicating that they intended to launch their lactic acid drink on the Singapore market using the Yakult bottle in the near future. The plaintiffs through their solicitors wrote to Yakult Singapore on March 21, 1979, asking Yakult Singapore for an immediate written undertaking that they would not sell, offer for sale, or otherwise distribute their lactic acid drinks in bottles which are identical or similar to the Vitagen bottles. No such written undertaking was forthcoming from Yakult Singapore. Instead of which Yakult Singapore and Yakult Japan issued a writ on March 30, 1979, against the two plaintiffs claiming

"a declaration that unless and until the courts of the United Kingdom shall finally determine that the second defendant (*MM*) is the true and lawful proprietor and beneficial owner of the said Registered Design No. 977999 then each of the plaintiffs is entitled to manufacture and sell yogurt in Singapore in the Yakult Singapore containers."

The principles to be applied in a case where a plaintiff seeks an interlocutory injunction are laid down in the House of Lords case of *American Cyanamid v. Ethicon*.⁽¹⁾ The initial test that has to be satisfied by a plaintiff, to be found in the speech of Lord Diplock at page 510, is that the court "must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". Lord Diplock said (at page 510):

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which will call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield v. Duke of Buccleuch* (1865) 12 L.T. 628 at 629). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the convenience lies in favour of granting or refusing the interlocutory relief that is sought."

The first question is, have the plaintiffs in this case established by the evidence before me that they have any real prospect of succeeding in their claim for permanent injunction in terms of the notice of motion?

What the plaintiffs have to establish first is that the shape of the Vitagen bottle has become by use in Singapore associated exclusively with the plaintiffs' lactic acid drink so that the use of a bottle so shaped will be understood by the trade and public in Singapore as meaning that the goods thus marketed are the goods of the plaintiffs and no one else. (See *Jarman & Platt Ltd. v. I. Barget Ltd.*⁽²⁾). The plaintiffs say that they have since April 1977, built up a substantial business in Singapore and Malaysia in their lactic acid drink "Vitagen" and the development of the market has been fostered by a skilful and expensive marketing campaign. One important way in which they have succeeded in making their product familiar to the public has been the use of the Vitagen bottle which is of unusual and unique shape. This container does not merely have the virtue of a distinctive appearance — it is functional in that the top makes it easy to drink from.

Let us see how the plaintiffs have developed the market for their "Vitagen" in their marketing campaign. The plaintiffs say that one important way in which they have succeeded in making their product familiar to the public has been the use of this unusual and unique shape bottle. Now, if the shape of the bottle was intended to be and had indeed become distinctive of the plaintiffs' product one would expect the bottle to feature as such prominently in all the plaintiffs' advertisements and other publicity material. This has not been done and instead the plaintiffs have sought to teach the public to identify their product by the brand name "Vitagen". The advertising emphasis has not been on the shape of the bottle but on the brand name "Vitagen" which is prominently displayed on the containers and is used in advertising material concerning such goods. There is no statement in the

A advertisements to say that the public could recognise the plaintiffs' product by the shape of the bottle.

As part of the arrangements made with Yakult Japan, concerning the manufacturing and marketing of the Yakult Product in Singapore, Yakult Singapore was granted a licence to market the Yakult Product in the Yakult bottle a container of the same shape as that in which the Yakult Product is marketed in Japan and in Taiwan, Brazil, Hong Kong, Thailand, South Korea, and Philippines by Yakult Japan and their licensees.

In view of the evidence of E. Fujimoto who designed the Yakult bottle and in view of the extensive advertising by Yakult Japan and by Hong Kong Yakult Company Ltd. (Yakult Hong Kong) I find it surprising that the plaintiffs can claim that the design alleged to have been produced by Aw Soon Cheong, the Plant Manager for MDI, and used for the Vitagen bottle, was the original design since even from the advertisements it appears to be the same as the Yakult design. It is inconceivable that Thio Keng Poon, the Managing Director of both MDI and MM, who has been interested in the manufacture and sale of milk-based beverages and has business interests in Hong Kong and contacts in Japan, was not aware of Yakult Hong Kong and that Yakult Japan and Yakult Hong Kong used the Yakult bottle in which to market their product. Yakult Japan sold their drinks in Japan in glass containers in the '60s and beginning in 1966 they began to go over to the Yakult bottles. Yakult Hong Kong used the Yakult bottle since 1971. It is likely that he was also aware that in August 1972, Yakult Japan brought their Yakult product in their Yakult bottle to Singapore to conduct a market research project in Singapore in order to ascertain whether the population in Singapore found the taste of the Yakult product palatable. In my view the survey that was conducted by Frank Small & Associates (S.E. Asia) Pte. Ltd. on behalf of the plaintiffs, has no relevance at all to establish reputation. The interviewees were shown not a Vitagen bottle but a Yakult Singapore bottle and there is nothing in the data gathered in the survey to show that any of the persons interviewed identified the Yakult Singapore bottle with the Vitagen bottle. I do not think that it is possible, on the evidence I have, for the plaintiffs to acquire any distinctiveness in their bottle. If the plaintiffs' goods have some distinctive feature then this feature is the word "Vitagen" which is prominently displayed in the container and is used in advertising material concerning such goods. In my view the shape of the bottle is not and cannot be distinctive of the goods of the plaintiffs as it is a copy of the container which is identified as the Yakult container. It would appear that the plaintiffs copied the Yakult bottle.

The plaintiffs also complain of the proposed use I by the defendants on their containers of the reference to "THE ORIGINAL LB-CULTURED MILK DRINK". The plaintiffs claim exclusive right to the letters "LB". The plaintiffs say that they have used "LB" to describe one of the flavours of their drink; that they have also used in their advertising the expression "LB Factor" in order to denote the principal beneficial ingredient in their product; that "LB" refers

to "Lactobacillus" which is a bacteria found in all "VITAGEN" drinks and that "LB" is their trademark. It is quite wrong for the plaintiffs to make a claim to such a right to prevent Yakult Singapore from describing the Yakult product as a product containing lacto bacilli. "LB", meaning the lacto bacillus, is a principal beneficial ingredient in the drink. The letters "LB" are used in a purely descriptive sense and I do not see how the plaintiffs can have any exclusive rights to such abbreviation.

In my view the plaintiffs have failed to establish that the shape of the Vitagen bottle has become by use in Singapore distinctive of the plaintiffs' lactic acid drink, and that they have an exclusive right to use the letters "LB".

The plaintiffs say that many potential purchasers of the lactic acid drink will be misled if the defendants are allowed to market their lactic acid drink in the Yakult bottle into thinking that the defendants' products are a smaller sized version of the plaintiffs' lactic acid drink. The plaintiffs say that the Yakult bottles bear a substantial resemblance in all material respects to those in which the plaintiffs' lactic acid drinks are sold.

I do not agree with the submissions of the plaintiffs. There is no substantial confusing resemblance between the Yakult Singapore bottle and the Vitagen bottle. It is true that the bottle shapes are the same. Leaving aside the bottle shape there are numerous and obvious differences in the get-up and appearance as appears from a direct comparison. The word "Yakult" which is featured prominently on the Yakult Singapore bottle cannot be confused either visually or phonetically with "VITAGEN". The printing is of a different colour. The layout of the wording is different and it has a coloured foil top cap upon which the word "Yakult" appears. A purchaser who is buying a lactic acid drink will normally look carefully at the container to select the flavour of his choice and the brand of his choice and the purchaser will not be confused as to either the identity of the contents or the brands.

Yakult Singapore proposed to carry on an extensive advertising campaign in the press, radio and television in order to identify the Yakult product with Yakult Singapore which will feature the Yakult Singapore container and this will have the effect of distinguishing the plaintiffs' Vitagen product.

Because of the difference in markings, size and get up and because of the proposed advertising campaign potential purchasers will not be misled, nor will there be any confusion in the minds of the public.

The plaintiffs say that if the defendants are allowed to market the lactic acid drink in Singapore in the Yakult Singapore container the business in their lactic acid products will be damaged to an unquantifiably extent between now and the trial of this action and even if an injunction were to be granted at the trial of this action the damage may well prove to be irreparable.

The plaintiffs have not clearly shown that the damage which would be caused to them by competition from the defendants' pending trial would be irreparable

in the sense of damage which cannot be ascertained with reasonable accuracy and which cannot be compensated in money. There is no question of the defendants being unable to pay damages. The plaintiffs therefore do not need the protection of an interlocutory injunction to assist them in securing their remedy.

For these reasons I dismissed the motion.

Motion dismissed.

Solicitors: Allen & Gledhill; Donaldson & Burkinshaw.

C OVERSEAS ASSURANCE CORPORATION LTD. v. LEE TEIK TEIK

[O.C.J. (Chua J.) August 22, 1979]

[Singapore — Civil Suit No. 3648 of 1976]

Insurance — Motor insurance — Policy issued to defendant — Accident — Vehicle involved in accident driven by person not named in policy — Whether insurer could recover money already paid to third party — Road Traffic Ordinance, 1958 (F.M.), ss. 75(1)(b) and 80(1).

The plaintiffs in this case were authorised motor insurers. By a policy of insurance issued to the defendant, the plaintiffs agreed for a period of one year from November 15, 1973 to November 14, 1974, to insure the defendant and two other named drivers in respect of any liability which might be incurred by the defendant or the named drivers in respect of the death or bodily injury to any person caused by or arising out of the use on the road of a motor vehicle No. JK 9794 of which the defendant was the registered owner. On November 27, 1973, the plaintiffs delivered to the defendant in respect of the policy a Certificate of Insurance. On February 22, 1974 the said vehicle was involved in an accident in the State of Johore with one Tan. The vehicle was driven by one Balaedom who was not one of the named drivers in the policy. Tan commenced proceedings in Johore against the defendant and Balaedom for personal injuries sustained by him. On October 14, 1975 he obtained judgment against the defendant and Balaedom. On November 11, 1975, the plaintiffs paid to Tan \$26,500 due under the judgment. The plaintiffs sought to recover from the defendant the said sum of \$26,500.

Held, dismissing the plaintiffs' claim: (1) under section 80(1) of the Road Traffic Ordinance, 1958 (F.M.), the duty of an insurer to satisfy a third party's judgment can only arise if the terms of the policy in the first place provide adequate cover to the person insured under the policy;

(2) there never was any insurance involving liability on the part of the plaintiffs in regard to the person who was driving the motor vehicle and it must follow as a matter of law that there is nothing in section 80(1) which would make the plaintiffs liable for that which in truth they have never insured against.

Case referred to:-

(1) *Ahmad Sandara Lela Putera & Anor. v. Queensland Insurance Co.* [1975] 1 M.L.J. 269.

CIVIL SUIT.

C.S. Wu for the plaintiffs.

S.P. Pillai for the defendant.

Cur. Adv. Vult.

Chua J.: The plaintiffs are authorised motor insurers. By a policy of insurance dated November 27, 1973, (the policy) issued by the plaintiffs to the defendant, the plaintiffs agreed for the period of one year from November 15, 1973, to November 14, 1974, to insure the defendant and two other named drivers in respect of any liability which might be incurred by the defendant or the named drivers in respect of the